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ABSTRACT

This paper provides an overview of the legal considerations involved in the search process for administrative and faculty personnel and the results of a survey of search processes at 89 colleges and universities. It includes excerpts from 10 federal laws concerning non-discrimination in the workplace requirements along with examples of applicable state laws. Recommended steps for filing vacancies and conducting a search process are then outlined. A November 1996 survey of 106 senior student affairs officers, senior human resources persons, or legal counsels examined actual practices utilized in the search process. Only 20 percent indicated that their institutions conducted such searches using a search consultant though most respondents believed their institutions would consider using a search consultant in the future for positions at the level of dean or higher. Approximately 40 percent of respondents indicated that searches conducted during the past 5 years had been questioned or challenged by candidates. Among respondents' suggestions for a successful search process were: timely communications with candidates during all phases of the process, establishing a documented process in case of questions or challenges, and keeping required qualifications to the minimum necessary to avoid being overly restrictive. (MDM)

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Avoiding Improper Candidate Search Strategies

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INTRODUCTION

Search processes on college and university campuses are becoming increasing complex. Much of this is due to the increasing influence of both state and Federal laws. In addition to that, the responsibility for coordinating the search and especially the work of the search committee often rests with a member of the faculty or administration who may or may not have had much experience with search processes and who certainly has other, on-going responsibilities. Recognizing that some people, therefore, embark into "unchartered waters" when conducting a search and in an effort to increase the likelihood that a search process will conclude successfully, the presenters will provide some information on the following topics as a way of stimulating discussion among those attending this session.

I. The Legal Considerations in Search Processes: An overview of applicable Federal laws

II. Administrative Considerations in Search Processes: Outline of the recommended steps

III. What We Learned From Our Colleagues: A summary of a survey conducted in November, 1996, regarding various aspects of search processes and the role of search consultants

I. THE LEGAL CONSIDERATIONS IN SEARCH PROCESSES: AN OVERVIEW OF APPLICABLE FEDERAL LAWS.

Various federal laws, and state laws, concerning non-discrimination in the workplace apply to search and screen procedures. The following is a list and description of those federal laws which prohibit discrimination on the basis of race, national origin, sex, religion, age and

disability. The federal enforcement agency is indicated in parenthetical at the end of the description

Age Discrimination Act of 1975, 42 U.S.C. §§6101 et seq.	It prohibits discrimination on the basis of age by recipients of federal financial assistance. This law applies to all decisions based on age regardless of the age of the individual. This is an obscure act which is generally not used by complainants. [The Office for Civil Rights ("OCR") enforces this act as it applies to educational institutions.]
Age Discrimination in Employment Act ("ADEA") 29 U.S.C §621 et seq.	It prohibits discrimination in employment against individuals forty (40) years of age or above. It applies even if the individual selected for the position is also within the protected category (40 years or above). [The Equal Employment Opportunity Commission (the "EEOC") investigates these kinds of complaints.]
Americans with Disabilities Act of 1991 ("ADA"), 42 U.S.C. §§12101 et seq.	Title I of the ADA prohibits discrimination against individuals with disabilities in all aspects of employment, including the selection of applicants. The law applies to private employers, state and local governments, employment agencies and labor unions. To be covered under the ADA, the person must have a disability as defined in the Act. The Act defines disability as: 1) having a physical or mental impairment that substantially limits one or more major life activities; 2) having a record of such an impairment; or 3) regarded as having such an impairment. The Act also protects individuals with "associational disabilities" i.e., those who are associated with someone protected under the definition (such as individuals with AIDS). The Act specifically exempts several categories of individuals including transvestites, homosexuals, bisexuals, transsexuals. Individuals with contagious or infectious diseases are covered but to be qualified the individual must not pose a direct threat to the health or safety of others. A person currently engaged in the use of illegal drugs is not protected. Alcoholics whose current use prevents them from performing the job duties or who are a direct threat are not protected by the Act. In addition of being disabled under the Act, the person must be a "qualified" employee or applicant, i.e., an individual who, with or without reasonable accommodations can perform the central functions of the job at issue. Like Section 504, this is a non-discrimination statute; it does not require affirmative action. (EEOC enforces this Act.)

Executive Order 11246, as amended, 30 Fed. Reg. 12319, September 24, 1965	This is a Presidential Executive Order which requires federal contractors to develop and implement a written affirmative action plan. It also prohibits contractors from discriminating against applicants or employees on the basis of race, color, religion, national origin, sex or disability. Additionally, contractors must take affirmative steps to recruit, hire, train and promote persons in these protected classes. [The Office of Federal Contract Compliance Programs ("OFCCP") is the enforcing federal agency. That office conducts compliance review and also investigates specific complaints of discrimination.]
Sections 503 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§793 and 794	These laws prohibit recipients of federal financial assistance from discriminating against otherwise qualified persons with disabilities. Section 503 applies to contractors with the federal government. It requires federal contractors to take affirmative steps to recruit, hire, train and promote persons with disabilities. Section 504 applies to recipients of federal financial assistance such as educational institutions. This section does not require affirmative action, but it prohibits discrimination. The definition of "disability" is the same as the ADA definition. The recipient of federal financial assistance must make reasonable accommodations to the "known" physical or mental limitations of a disabled applicant unless the recipient can demonstrate that the accommodation would impose an undue hardship. Offers of employment may be conditioned on the results of medical examinations as long as the examinations are administered to all employees in a non-discriminatory manner and the results are treated on a confidential basis. (OFCCP enforces Section 503 and OCR enforces Section 504.)
Fourteenth Amendment to the United States Constitution	The Fourteenth Amendment provides all persons in the United States with equal protection under the law. This law applies to the federal government and state agencies and their instrumentalities. (To enforce this provision litigants must file a claim in court.)
Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d	This law prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. (OCR enforces this law as it applies to educational institutions.)

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e	This law prohibits discrimination in employment on the basis of race, color, national origin, sex or religion. The law applies to any employer with 15 or more employees. The law was amended to specifically prohibit discrimination on the basis of pregnancy or matters related to pregnancy. The law does not require affirmative action. (EEOC enforces this law.)
Title IX of the Education Amendments of 1972, 20 U.S.C. §1681	This law prohibits discrimination by educational institutions on the basis of sex. The law has been interpreted to apply in the employment context as does Title VII. (OCR is the enforcing agency.)
Vietnam Era's Readjustment Act of 1974, 38 U.S.C. §4211 et seq.	This law prohibits recipients of federal funds from discriminating against veterans and requires affirmative steps to recruit, hire, train and promote veterans. The law does not require the hiring of less qualified veterans over non-veterans. The federal regulations require contractors covered by the Act (contracts or property of $10,000 or more) to invite disabled veterans to identified themselves to the contractor, but the invitation must state that the information in voluntarily provided, that it will be kept confidential, that refusal to provide it would not subject the applicant or employee to any adverse treatment and that it would be used only with accordance with the law. (Same requirements as Section 504). The law also provides that no veteran may be considered a veteran of the Vietnam Era after December 31, 1991. (OFCCP is the enforcing agency.)

In addition to the above federal laws, there are specific state statutes and regulations that also prohibit discrimination on the same basis as the federal laws. In Florida, the Florida Civil Rights Act of 1992 prohibits discrimination in employment on the basis of race, color, religion, national origin, age, disability and marital status. Additionally, the Florida Educational Equity Act, enacted in 1984, prohibits discrimination in the state system of public education and the Florida Equity Accountability Act requires institutions in the State University System to set goals for the hiring of minorities and females in upper level administrative and faculty positions. It also requires those institutions to develop and implement procedures to achieve these goals. There are also other significant state law that may be applicable to the search and screen process such as

open records law and open meeting laws. In states such as Florida, all of the records received, maintained or generated by the search and screen committee, except some personal notes of committee members, are open to the public and must be disclosed upon request by any member of the public. Similarly, the meetings of the Committee, including the interview with the candidates, are public meetings.

In addition to the non-discrimination laws listed above, significant federal law that has applicability in the employment context is the Immigration Reform and Control Act of 1986, as amended ("IRCA"). This law imposes various requirements. It 1) prohibits employers to knowingly recruit, hire or refer for a fee aliens who are not authorized to work; 2) requires employers to verify the identity and work authority of each employee hired after November 6, 1986; 3) requires the maintenance of records regarding the verification process; and 4) prohibits discrimination against individuals on the basis of their citizen status or their national origin. Therefore, institutions must ensure that applications for employment and interviewers of applicants do not request information that might be considered violative of this Act. However, applicants may be asked whether they have authorization to work in the United States. Offers of Employment should be conditioned on the person's ability to provide the necessary work authorization documents.

II. ADMINISTRATIVE CONSIDERATIONS IN SEARCH PROCESSES: OUTLINE OF THE RECOMMENDED STEPS

Search and screen procedures have been affected as a result of the legal requirements concerning equal opportunity and affirmative action. Many institutions have developed policies as part of ~~its~~ their affirmative action plan or as a result of ~~its~~ their non-discrimination policies. Generally the primary

purpose of search and screen procedures is to assure equal employment opportunity to all candidates. If affirmative action requirements are applicable, one of the purposes of the procedures is to identify and attract qualified minority female and disabled applicants for consideration for vacancies. The following are the natural steps that should be followed in filling vacancies:

1. Identify vacancy to be filled.
2. Establish the Search and Screen Committee.
3. Draft the position vacancy announcement (this may be developed by the hiring administrator and by the search and screen committee), and advertise the position.
4. Mail acknowledgment upon receipt of applications. If a deadline for the application was provided, individuals whose application was received late should be notified of the untimeliness of their application. Applicants who do not meet the minimum criteria should also be notified that they are not being considered.
5. Review applications and screen and select applicants to be interviewed. (A criteria needs to be developed to allow members of the committee to select the best qualified candidates in a non-discriminatory basis.)
6. Background Review and Reference Check. As part of the screening process, the members of the committee should decide the format to follow to check the references of applicants selected for interview.
7. The Interview Process. Some internal policies of institutions require that prior to scheduling interviews the applicant pool be certified as being representative on the basis of race, national origin, and sex. Prior to conducting the interviews, the

committee should make decisions as to the general areas to be explored with the candidates. Committee members must be made aware that certain questions must not be asked and that other questions should not be asked. For example, while the applicant may be asked whether he or she is able to perform the job responsibilities, the applicant must not be asked about disabilities and should not be asked about plans to start a family, child care arrangements, etc.

8. Recommend candidates for second interview or hiring.

9. Hiring Process. A Letter of Offer should be provided to the successful candidate with the necessary information/requirements and asking the candidate to sign it to indicate acceptance.

10. Notification to non-successful candidates.

11. Reporting and record-keeping requirements.

During the review and selection process, the search and screen committee should be working closely with the institutions' Office of Equal Opportunity, the hiring administrator and the Office of Personnel. If a consultant is hired to assist the committee in the search process, obviously the consultant(s) would also be working closely with the committee.

III. RESULTS OF A SURVEY ABOUT COLLEGE AND UNIVERSITY SEARCH PROCESSES

A. Method

On November 2, 1996, 257 surveys were sent to 89 institutions. These were mailed to the senior student affairs officer at each institution who was asked to forward a copy of the survey to the institution's senior Human Resources ("HR") person and legal counsel. Prior to mailing the

surveys some institutions indicated that they did not have in-house legal counsels so those institutions only received two surveys. Surveys were returned from 53 senior student affairs officers (60% return rate), 37 senior HR persons (42% return rate) and 16 legal counsels (18% return rate). Seventy-seven percent of the institutions responding were public, and twenty-three percent were private. Ninety-six percent were four-year and four percent were two-year institutions.

B. Results

The following is a summary of the findings from the survey.

1. TYPES OF POSITIONS FOR WHICH NATIONAL SEARCHES WERE CONDUCTED AND DEGREE OF SUCCESS:

Positions for which searches were conducted during the past five years ranged from assistant directors of departments through directors and deans to the Chief Executive Officer ("CEO") (president or chancellor). An average of 75% of the respondents indicated that they conducted national searches for those types of positions compared to an average of 20% who said that they conducted such searches using a search consultant. When commenting on the overall success of the searches, both the senior student affairs officer and the HR persons felt that the searches conducted without the assistance of a search consultant were more successful that those conducted with the assistance of a search consultant. Legal counsels, on the other felt the opposite.

Aside from the degree of overall success, respondents were asked to indicate the nature of individual searches which may have been less successful than desired. This is what they said: 18% felt that the search committee wasn't adequately trained in the process;

19% felt that the person selected lacked the full support of the campus community;

20% felt that the committee wasn't clear about the skills needed in the person to be selected; and

45% felt that the committee didn't have the best possible applicant pool;

2. INTERNAL CANDIDATES AND PROMOTIONS

Only 38% of those responding indicated that their institutions had a policy in place that would allow for the promotion of an internal candidate into a position for which they had conducted national searches. Ironically, a number of anecdotal comments expressed concerns about searches that were conducted when an internal candidate was known to be the person who would be "selected."

3. METHODS USED TO ADVERTISE VACANCIES

Virtually all institutions used on-campus announcements, publications/newsletters of professional associations, and announcements in national publications such as The Chronicle of Higher Education as a means of advertising the vacancies. A slightly smaller number also used advertisements in local papers and letters with position announcements sent to colleagues while a considerably smaller number also used posting on the Internet.

4. CONFIDENTIALITY OF CANDIDATES

Many candidates wish to keep their candidacies confidential which conflicts with the laws of some states which require that certain types of information be made public at certain stages of the process; sometimes from the very beginning. Approximately 25% of the respondents indicated that state law required that search committee meetings be open while approximately 30% said that state law required public disclosure of all candidates. Most indicated that their institutions had policies for a retention period for the files of candidates while about a third said

that state law provided for the release of information in those files to the applicant.

5. CHALLENGES TO THE SEARCH PROCESS

Approximately 40% of the respondents indicated that searches conducted during the past five years had been questioned or challenged by candidates. One HR person indicated that in a span of one year the institution had three challenges around the issues of ethnicity and gender. These were also common reasons cited by others. Other issues identified were age discrimination, and unsuccessful candidates' qualifications as compared to the qualifications of the persons interviewed or the person selected.

6. WHEN INSTITUTIONS MIGHT USE A SEARCH CONSULTANT

Regardless of whether they used a search consultant in the past, the vast majority of respondents indicated that it was likely that their institutions would consider using a search consultant in the future primarily for positions from deans' level up to those positions reporting to the CEO. The respondents said that it would be very likely that their institutions would consider using a search consultant in the future when searching for a CEO.

The following represent the percentages of respondents who indicated that certain aspects of a search process could be improved upon, thereby resulting in a successful search, if they were handled by a search consultant.

-Screening credentials for accuracy 49%

-Providing training for members of search committee 46%

-Obtaining information from candidates' references 39%

-Helping to assure that the position description reflects current needs 35%

-Helping to clarify the institution's needs & goals to be addressed 34%

-Determining the methods of announcing the vacancy 28%

-Writing the position announcement and having the institution give final approval 24%

-Receiving application materials; conducting telephone interviews to determine a group of finalists; communicating with candidates up to the invitation to interview on campus; and conducting the entire process up to recommending finalists (all of these were approximately) 20%

7. RECOMMENDATIONS FROM THE RESPONDENTS

Some respondents made suggestions about how to improve the likelihood of a successful search process. The following summarizes their comments:

a. Timely communicated with candidates during all phases of the process;

b. An accurate, up-to-date position description;

c. Search committee members who are informed about legal issues and the "technical" aspects of the positions and who conscientiously perform the administrative tasks associated with the search process;

d. A documented process in cases questions/challenges arise;

e. A hiring authority willing and able to make decisions;

f. Developing an adequate candidate pool through consistent screening;

g. Having a clear understanding of the criteria to be applied in the selection;

h. Carefully checking references and planning the interview phase;

i. Keep required qualifications to the minimum necessary to avoid being overly restrictive;

j. Carefully determine the place in which the announcement will appear and use personal contacts affirmatively;

k. Keep the process confidential to the extent possible based on laws or policies; and

l. A search committee of no more that 8 to 12 people which has clear expectations and timelines which is chaired by someone credible.